APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 4, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-10872

In The Matter Of: LARRY BROWN

Debtor

CITY BANK; SCOTT SEIDEL

Appellants

v.

INDUSTRIAL BANK NA

Appellee

Appeal from the United States District Court
for the Northern District of Texas
No. 4:05-CV-35

Before KING, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

The order of the bankruptcy court was correct for the reasons well set out in its Memorandum Opinion and Order; therefore, we REVERSE the judgment of the district court. The district court erred as a matter of law in concluding that the dismissal of the two previous bankruptcy proceedings necessarily served both to lift the automatic stay and to cleanse the appellee's violations of the stay. *In re Brown*, 330 B.R. 548, 553 (N.D. Tex. 2005) (stating that "11 U.S.C. § 349(b) caused the dismissals of Cases 1 and 2 to have the effect of validating actions taken . . . during the pendency of those cases"). The bankruptcy court correctly recognized that the dismissal of a bankruptcy proceeding does not necessarily retroactively validate actions taken in violation of an automatic stay. Rather, the retroactive validation of actions taken in violation of an automatic stay is reserved to the *discretion* of bankruptcy courts, and they are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay. *See, e.g., In re Cueva*, 371 F.3d 232, 236 (5th Cir. 2004) (stating that bankruptcy courts have "broad discretion" to grant or to deny retroactive annulment or modification of an automatic stay); *In re Thornburg*, 277 B.R. 719, 731 (Bankr. E.D. Tex. 2002) (stating that bankruptcy courts should grant retroactive relief for actions that violated an automatic stay only in exceptional circumstances). The bankruptcy court correctly exercised that discretion here.

The final judgment of the district court is REVERSED, and the Memorandum Opinion and Order of the bankruptcy court is AFFIRMED. Costs shall be borne by appellee.

APPENDIX B — MEMORANDUM OPINION AND ORDER, AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION DECIDED AND FILED JUNE 21, 2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

NO. 4:05-CV-035-A

IN RE: LARRY BROWN,

Debtor.

INDUSTRIAL BANK N.A.,

Appellant,

VS.

LARRY BROWN, ET AL.,

Appellees.

June 21, 2005, Decided
June 21, 2005, Filed

JUDGE: JOHN McBRYDE, United States District Judge.

Appendix B

MEMORANDUM OPINION and ORDER

This action comes before the court as an appeal from an order of the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, the Honorable Dennis Michael Lynn presiding. The court, having considered the briefs of appellant, Industrial Bank N.A., and appellee City Bank[1], the record on appeal, and applicable authorities, finds that the bankruptcy court's order should be reversed for the reasons given below.

I.

Jurisdiction

The appeal is from an order sustaining an objection to appellant's secured claim and denying its alternative motion to annul automatic stays. The court is satisfied that the order is final and appealable. *See Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1284 (2d Cir. 1990). This court's jurisdiction exists pursuant to 28 U.S.C. § 158.

II.

Underlying Proceedings

The description of pertinent facts given by the bankruptcy court is sufficient for purposes of this opinion:

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1. Appellee Larry Brown, the debtor, has not filed a brief or anything else in response to appellant's brief on appeal.

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On August 5, 2002, Debtor [appellee Larry Brown] filed a voluntary petition ("Case 1") under chapter 13 of the Bankruptcy Code. Case 1 was initially dismissed on October 16, 2002; reinstated on November 19, 2002, pursuant to a timely motion; and finally dismissed on May 21, 2003. Although City Bank was not listed as a creditor on Debtor's original schedules, City Bank filed a Notice of Appearance and Request for Service of Papers as "a creditor of, and a party in interest in this [Case 1]" on December 11, 2002, and filed a proof of claim on January 27, 2003. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 1. During the pendency of Case 1, Industrial Bank sued Debtor on September 23, 2002; obtained a default judgment (the "Judgment") on February 10, 2003, and recorded the Judgment against Debtor on March 28, 2003.

On June 3, 2003, thirteen days after dismissal of Case 1, Debtor filed a voluntary petition ("Case 2") under chapter 11 of the Code. Case 2 was dismissed on January 7, 2004. City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 2. During the pendency of Case 2, Industrial Bank obtained in connection with the Judgment a writ of execution against Debtor on

> June 25, 2003, and gave Debtor notice of levy under the writ of execution on August 28, 2003.
>
> On February 27, 2004, fifty-one days after dismissal of Case 2, Debtor filed the above-captioned chapter 11 case ("Case 3"). City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 3. On March 19, 2004, during the pendency of Case 3, Industrial Bank obtained in connection with the Judgment an order granting post-judgment sanctions against Debtor.
>
> On March 26, 2004, Industrial Bank received notice of Case 3 and in April 2004 learned of Debtor's Case 1 and Case 2. On May 20, 2004, Industrial Bank filed in Case 3 a secured creditor Proof of Claim based on the Judgment.

Nov. 10, 2004, Mem. Op. & Order at 2-3 (footnote omitted). The August 2003 levy under the writ of execution was on a deferred compensation contract debtor had with the Oakland Raiders.

City Bank objected to appellant's claim, asserting that all actions taken by appellant during the pendency of Cases 1 and 2 were in violation of the automatic stays. City Bank requested the bankruptcy court to disallow appellant's claim as a secured claim and, at best, to allow the claim as an unsecured claim. Appellant, on the other hand, filed an

alternative motion to annul the automatic stays as to Cases 1 and 2 retroactively so that its claim would be secured. Also, appellant argues that City Bank lacked standing to challenge appellant's claim. Three days before the hearing, debtor, appellee Larry Brown, filed documents by which he joined in City Bank's filings.

On September 27, 2004, the bankruptcy court held a hearing to consider motions filed by appellant and City Bank. After considering supplemental materials filed by the parties, on November 10, 2004, the bankruptcy court issued its memorandum opinion and order (a) sustaining the objection to appellant's secured claim, (b) denying appellant's motion to annul the automatic stays, (c) denying as moot City Bank's alternative motion for authority to avoid post-petition attachment of appellant's security interest, and (d) allowing appellant's claim as a general unsecured nonpriority claim. Appellant appeals from that order.

II.

Issues on Appeal

Appellant sets forth six issues on appeal. They are:

(1) whether the bankruptcy court erred in sustaining City Bank's objection to the secured status of appellant's claim;

(2) whether City Bank did not have the requisite legal standing to object to appellant's claim;

(3) whether the bankruptcy court erred in failing to find that a challenge to the post-petition fixing of appellant's lien was time-barred pursuant to 11 U.S.C. § 549 and *In re Pointer*, 952 F.2d 82 (5th Cir. 1992);

(4) whether the bankruptcy court erred in failing to find that the dismissal of debtor's previous bankruptcy cases voided the automatic stays and validated any action taken by appellant while the previous cases were pending;

(5) whether, in view of the undisputed evidence presented by appellant, the bankruptcy court erred in failing to find cause to annul the automatic stay and grant appellant's motion to annul the automatic stay; and

(6) whether the bankruptcy court erred in determining that the debtor's untimely joinder in City Bank's objection to appellant's claim and alternative motion for authority to avoid post-petition attachment of alleged security interest of appellant rendered the issue of City Bank's standing moot.

IV.

Discussion

A. *Whether Standing is an Issue.*

Appellant contends City Bank lacks standing to contest appellant's secured claim, relying on *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82 (5th Cir. 1992). *Pointer*, however, is not in point as to City Bank's contest to appellant's claim. There, the court focused its attention on

standing under 11 U.S.C. § 549. Here, City Bank's standing is established pursuant to 11 U.S.C. § 502(a), which authorizes "any party in interest" to object to a claim.[2] Moreover, debtor's joinder in City Bank's objection to appellant's claim renders moot the issue of City Bank's standing. The bankruptcy court did not err in giving effect to debtor's joinder.

B. The Dismissals of Cases 1 and 2 Had the Effect of Nullifying the Stay as to Actions Appellant Took During Pendency of Those Cases.

Automatic stays pursuant to 11 U.S.C. § 362 were in effect during the pendency of Cases 1 and 2. *See Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004). Actions taken by appellant against debtor or his property while those stays were in effect were subject to the stays even though appellant had no knowledge that the cases had been filed. *Id.* Appellant's actions, when they were taken, against debtor and his property during the pendency of the cases were voidable. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) (saying "[w]e are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void"). *See also Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990).

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2. Because the court has upheld City Bank's right to object to appellant's claim, the motion City Bank filed September 16, 2004, titled "City Bank's Alternative Motion for Authority to Avoid Post-Petition Attachment of Alleged Security Interest of Industrial Bank, N.A.," continues to be moot.

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In a footnote in *Jones v. Garcia (In re Jones)*, a panel of the Fifth Circuit explained that the statements in *Picco* and *Sikes* that actions taken in violation of the stay are voidable, and not void, really mean that "[i]t is the effect of the stay *itself* which is voidable, subject to the broad discretion afforded a bankruptcy court under section 362." 63 F.3d 411, 413 n. 3 (5th Cir. 1995). Regardless of the meaning the respective panels of the Fifth Circuit had in mind when they made the "voidable" statements in *Picco* and *Sikes*, the end result would be the same—actions taken in violation of the stay are subject to being cleansed of the effect of the stay by subsequent action of the bankruptcy court. *See Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F.3d 338, 344 (5th Cir. 2003) (expressing the view of the Fifth Circuit in 2003 that "violations [of the automatic stay] are merely 'voidable' and are subject to discretionary 'cure' "). Such a view is consistent with the primary function of a § 362 stay, for, as one court explained:

> The primary function of the § 362 stay is to protect the assets of the estate for the benefit of creditors, so that an equitable distribution according to the statutory scheme can be effected. Upon dismissal, the need for this protection is eliminated. [Title 11 U.S.C. §] 349(b) recognizes this fact in its "reinstatement" of all transfers avoided during the pendency of the proceeding.

In re Linton, 35 B.R. 695, 697 (Bankr. D. Idaho 1983).

In *Linton*, the court relied on 11 U.S.C. § 349(b) when recognizing as valid voidable action taken against the

debtor's property during existence of the automatic stay, explaining that the court found "no policy of the Code thwarted by this recognition. . . ." *Id.*[3]

The court has concluded that 11 U.S.C. § 349(b) caused the dismissals of Cases 1 and 2 to have the effect of validating

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3. Title 11 U.S.C. § 349(b) reads:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title —
>
> (1) reinstates —
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> (A) any proceeding or custodianship superseded under section 543 of this title;
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> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
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> (C) any lien voided under section 506(d) of this title;
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> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
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> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

actions taken by appellant during the pendency of those cases. In other words, the orders of dismissal of Cases 1 and 2, when considered with § 349(b), were orders of the bankruptcy court that annulled whatever effect the automatic stays resulting from those cases otherwise had on actions taken by appellant. As the court deciding *Shell Oil Co. v. Capital Financial Services* explained:

> Liens that violate the automatic stay are voidable at the trustee's discretion, but they are not automatically void. When a bankruptcy is dismissed, the property of the estate revests in the entity that held the property immediately before the case began. 11 U.S.C. § 349(b)(3). The dismissal also ends the automatic stay and it acts, in effect, as a grant of relief from any automatic stay. . . .
>
> If the automatic stay was in effect when the IRS filed its lien against Gibson, the dismissal of the bankruptcy case terminated the stay and vested the interpleaded funds in Gibson. Since the trustee of Gibson's bankruptcy estate never avoided the IRS lien, the dismissal, essentially, acts as a grant of relief from the stay. Rather than void the lien, the dismissal voids the stay, and voids it from its inception. . . .

170 B.R. 903, 906 (S.D.Tex.1994) (citations and internal quotation marks omitted). *See also Norton v. Hoxie State Bank*, 61 B.R. 258, 260 (D. Kan. 1986) (recognizing that

"[a] dismissal of a bankruptcy case acts, in effect, as a grant of relief from any automatic stay previously in effect").

The effect of § 349(b), which is subject to interpretation, was clarified by the following legislative history:

> The basic purpose of [§ 349(b)] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.

S. REP. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835. For Cases 1 and 2 to be undone as to appellant, the effect of the stays on actions taken by appellant during the pendency of those cases would have to be negated. And, for appellant's rights to be restored to the positions they enjoyed at the commencement of Cases 1 and 2, appellant would have to be given the benefit of actions appellant took in the exercise of those rights during the pendency of those cases.

The court recognizes that there is case authority that supports City Bank's argument that dismissal of a bankruptcy case does not validate action taken in violation of the automatic stay. *See Elbar Inv., Inc. v. Pierce (In re Pierce)*, 272 B.R. 198, 211 (Bankr. S.D. Tex. 2001); *In re Prine*, 222 B.R. 610, 613 (Bankr. N.D. Iowa 1997); *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990). The court respectfully disagrees with the conclusions reached in those cases on the subject under discussion. Of possible significance, the *In re Prine* and *In re Lampkin* courts thought it important to their decisions to ascertain whether the actions taken in violation of a stay were void or voidable, and each

court ruled as it did because its circuit had held that actions taken in violation of a stay are void. The *In re Lampkin* court mentioned that "[t]he Fifth Circuit believes that violations of the stay are voidable," citing *Sikes*. 116 B.R. at 451. The holding in *In re Pierce* seems to have been influenced by a principle of Texas real property law "that a judicial sale in violation of Bankruptcy Code section 362 has no effect, even if the parties did not have notice of the stay, unless a bankruptcy judge grants retroactive relief from the stay." 272 B.R. at 210.

The bankruptcy court agreed with appellant that debtor should not be allowed to benefit from the protections of the automatic stays applicable to Cases 1 and 2, but concluded that City Bank and other creditors in Case 3 "should not suffer a detriment because Debtor failed to give notice of its bankruptcy filings to [appellant]."[4] Mini-Record, Vol. 1 at 9. In the course of concluding that appellant's claim should not be allowed as a secured claim, the bankruptcy court explained:

> Because allowance of the Judgment as a secured claim (1) would improve Industrial Bank's

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4. The court is unable to find anything in the record showing that treating appellant's claim as a secured claim would cause City Bank or any other creditor in Case 3 to suffer any detriment because debtor failed to give notice to appellant of his filings of Cases 1 and 2. There is nothing in the record to reflect that appellant gained an unfair advantage because it did not have notice of the automatic stays — there is nothing in the record to show that City Bank or any other creditor would have done anything to improve their respective positions as creditors if they had not known of the automatic stays or if Cases 1 and 2 had not been filed.

> creditor status to the prejudice of City Bank and those other creditors obedient to the mandates of the automatic stay and (2) would not further the purposes of the Code and the equitable distribution of Debtor's assets among creditors, the court is convinced that the Judgment should not be allowed as a secured claim with a perfected lien against the deferred contract proceeds.

Id. Those comments of the bankruptcy court would appear to be appropriate to a discussion of appellant's alternative motion to annul the automatic stay, the resolution of which could take into account equitable considerations. However, there is no hint in the language of § 349 or its legislative history that the cleansing effect of the dismissal of a case under Title 11 is dependent on factors such as those to which the bankruptcy court directed its attention. As introductory language of § 349(b) suggests, the effect of the statute can be modified on a case-by-case basis "for cause," but that modification would have to be made at the time and as a part of the dismissal of the case.

City Bank focuses in its brief on what it characterizes as appellant's "wrongful conduct" and "improper head start," Appellee's Br. at 16, implying that appellant engaged in improper conduct when it took the actions about which debtor and City Bank complain. But, there is no evidence that appellant had knowledge of the stays when it took those actions; and, the findings of the bankruptcy court on that subject, which are not challenged, are that appellant did not have knowledge of the stays. *Supra* at 2-3. Moreover, the court is of the belief that knowledge of the stays, *vel non*,

is not relevant to the issue under discussion. But, the court is not expressing an opinion as to what appellant's rights would be if it had knowingly violated the stays.

For the reasons given above, the court concludes that the actions taken by appellant during the stays related to Cases 1 and 2 should be given effect, and that the bankruptcy court erred in failing to do so. Because the court's ruling is based on the effect of § 349(b), the court is not required to reach issues related to appellant's alternative motion to annul automatic stays as to Cases 1 and 2, and declines to do so.[5]

V.

Order

For the reasons discussed herein,

The court ORDERS that the order of the bankruptcy court sustaining the objection to appellant's secured claim be, and is hereby, reversed.

The court further ORDERS that the bankruptcy court treat appellant's claim as a secured claim by giving appellant the benefit of actions appellant took during the pendency of Cases 1 and 2, including, but not limited to, the obtaining of

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5. The court does note, however, that the bankruptcy court appears to have been incorrect in its statement that appellant's allegations relative to its expenditures are unsubstantiated. *See* Mini-Record, Vol. 1 at 11. There was testimony that appellant incurred legal fees in excess of $80,000.00 in connection with its collection actions. R. at 328.

a default judgment on February 10, 2003, recording that judgment on March 28, 2003, obtaining a writ of execution against debtor on June 25, 2003, and giving debtor and the Oakland Raiders notice of levy under the writ of execution on August 28, 2003.

SIGNED June 21, 2005.

s/ John McBryde
JOHN McBRYDE
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

NO. 4:05-CV-035-A

IN RE: LARRY BROWN,

Debtor.

INDUSTRIAL BANK N.A.,

Appellant,

VS.

LARRY BROWN, ET AL.,

Appellees.

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that the November 10, 2004, order of the bankruptcy court sustaining the objection to the secured claim of appellant, Industrial Bank, N.A., be, and is hereby, reversed.

The court further ORDERS, ADJUDGES, and DECREES that the bankruptcy court treat the claim of

appellant as a secured claim by giving appellant the benefit of actions appellant took during the pendency of Cases 1 and 2, including, but not limited to, the obtaining of a default judgment on February 10, 2003, recording that judgment on March 28, 2003, obtaining a writ of execution on June 25, 2003, and giving Larry Brown, debtor, and the Oakland Raiders notice of levy under the writ of execution on August 28, 2003.

The court further ORDERS, ADJUDGES, and DECREES that appellant have and recover from appellee, City Bank, all costs of appeal incurred by appellant.

SIGNED June 21, 2005.

s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION DATED NOVEMBER 15, 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CASE NO. 04-42064-DML-11

IN RE:

LARRY BROWN,

Debtor.

MEMORANDUM OPINION AND ORDER

Before the court is City Bank's Objection to the Claim of Industrial Bank, N.A. (the "Objection") filed June 23, 2004. Industrial Bank's Response in Opposition to City Bank's Objection was filed July 12, 2004; and City Bank's Reply to Industrial Bank's Response was filed September 21, 2004. Larry Brown's ("Debtor") Joinder in the Objection was filed September 24, 2004.

Also before the court is the Motion of Industrial Bank to Annul Automatic Stay (the "Motion to Annul") filed August 26, 2004. City Bank's Response to Industrial Bank's Motion to Annul was filed September 10, 2004, and Industrial Bank's Reply in Support of Its Motion to Annul was filed September 24, 2004. Debtor's Joinder in City Bank's Response to the Motion to Annul was also filed September 24, 2004.

Appendix C

Also before the court is City Bank's Alternative Motion for Authority to Avoid Postpetition Attachment of Alleged Security Interest of Industrial Bank (the "Alternative Motion") filed September 16, 2004. Industrial Bank's Response to the Alternative Motion was filed September 24, 2004.

A hearing on the Objection, the Motion to Annul, and the Alternative Motion was held on September 27, 2004. At the conclusion of the hearing, the court invited the parties to submit supplemental briefs relevant to the issues raised at the hearing and took the matter under advisement. Both City Bank and Industrial Bank filed Supplemental Briefs on October 4, 2004.

I. BACKGROUND

The facts of this case are largely undisputed. On August 5, 2002, Debtor filed a voluntary petition ("Case 1") under chapter 13 of the Bankruptcy Code.[1] Case 1 was initially dismissed on October 16, 2002; reinstated on November 19, 2002, pursuant to a timely motion; and finally dismissed on May 21, 2003. Although City Bank was not listed as a creditor on Debtor's original schedules, City Bank filed a Notice of Appearance and Request for Service of Papers as "a creditor of, and a party in interest in this [Case 1]" on December 11, 2002, and filed a proof of claim on January 27, 2003. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 1. During the pendency of Case 1, Industrial Bank sued Debtor on September 23, 2002; obtained a default judgment (the "Judgment") on February 10, 2003, and recorded the Judgment against Debtor on March 28, 2003.

1. 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

Appendix C

On June 3, 2003, thirteen days after dismissal of Case 1, Debtor filed a voluntary petition ("Case 2") under chapter 11 of the Code. Case 2 was dismissed on January 7, 2004. City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 2. During the pendency of Case 2, Industrial Bank obtained in connection with the Judgment a writ of execution against Debtor on June 25, 2003, and gave Debtor notice of levy under the writ of execution on August 28, 2003.

On February 27, 2004, fifty-one days after dismissal of Case 2, Debtor filed the above-captioned chapter 11 case ("Case 3"). City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 3. On March 19, 2004, during the pendency of Case 3, Industrial Bank obtained in connection with the Judgment an order granting post-judgment sanctions against Debtor.

On March 26, 2004, Industrial Bank received notice of Case 3 and in April 2004 learned of Debtor's Case 1 and Case 2. On May 20, 2004, Industrial Bank filed in Case 3 a secured creditor Proof of Claim based on the Judgment.

II. DISCUSSION

Pursuant to the provisions of sections 502 and 506 of the Code, City Bank objects to Industrial Bank's claim and asserts that all actions taken by Industrial Bank during the

pendency of Cases 1, 2, and 3 to obtain, perfect, and enforce the Judgment were in violation of the automatic stay provisions of sections 362(a)(1)-(a)(5)[2] of the Code. City

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2. Section 362 provides in relevant part:

> (a) [A] petition filed . . . under this title . . . operates as a stay, applicable to all entities, of –
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

Code §§ 362(a)(1)-(a)(5).

Appendix C

Bank's Objection asks this court to disallow Industrial Bank's claim as a secured claim and, at best, to allow as unsecured any claim established by Industrial Bank pursuant to the Judgment. Industrial Bank argues that (1) creditor City Bank lacks standing to challenge Industrial Bank's claim; (2) the dismissal of Case 1 terminated the automatic stay and retroactively validated Industrial Bank's actions in connection with the Judgment; and (3) regardless of the effect of the dismissal of Case 1, cause exists for this court to annul the automatic stay and to retroactively validate the Judgment and allow Industrial Bank's secured claim.

Consistent with its position in response to City Bank's Objection, Industrial Bank's Motion to Annul maintains that cause exists for this court to annul the automatic stay and to retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment, notwithstanding Debtor's filing of Cases 1, 2, and 3. City Bank argues that retroactive validation of Industrial Bank's Judgment as a secured claim would unfairly allow Industrial Bank to improve its position over the claims of those unsecured nonpriority creditors who faithfully adhered to the strictures of the automatic stay.

Finally, City Bank's Alternative Motion seeks this court's *imprimatur* for City Bank to act in Debtor's stead in objecting to Industrial Bank's claim. City Bank argues that authority for City Bank to act on Debtor's behalf should be granted because Debtor failed to raise an objection to Industrial Bank's claim despite City Bank's repeated requests for Debtor to do so and, indeed, despite Debtor's *duty* to do so. Industrial Bank responds that City Bank lacks a colorable claim and

should therefore not be granted authority to act on behalf of Debtor.[3]

First. It is well established that the "purposes of the bankruptcy stay . . . are 'to protect the debtor's assets, provide temporary relief from creditors, and *further equity of distribution among the creditors* by forestalling a race to the courthouse.' " *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (emphasis added). *See also GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) (same); *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895, 897 (Bankr. N.D. Tex. 2004) (same); *Elbar Invs., Inc. v. Pierce (In re Pierce)* (hereafter *"Pierce I"*), 272 B.R. 198, 203-04 (Bankr. S.D. Tex. 2001) ("The stay is intended to benefit both debtors and creditors by assuring an equitable distribution of the debtor's assets and by preventing a race to the courthouse.").

Industrial Bank asks this court to overrule City Bank's Objection and to allow Industrial Bank's Judgment as a secured claim with a perfected lien against Debtor's National Football League deferred contract payments. Though the court agrees with Industrial Bank that Debtor should not be allowed to benefit from the protections of the automatic stay by remaining "stealthily silent," *see In re Smith Corset Shops, Inc.*, 696 F.2d 971, 977 (1st Cir. 1982), while Industrial Bank obtained the Judgment from state court, the court also

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3. Although it is likely this court would have granted City Bank's Alternative Motion based on the plain language of section 502(b) of the Code which allows a "party in interest" to object to a filed claim, Debtor's subsequent Joinder in the Objection and Joinder in the Motion to Annul effectively rendered the Alternative Motion moot.

believes that City Bank and other creditors in this case should not suffer a detriment because Debtor failed to give notice of its bankruptcy filings to Industrial Bank. Because allowance of the Judgment as a secured claim (1) would improve Industrial Bank's creditor status to the prejudice of City Bank and those other creditors obedient to the mandates of the automatic stay and (2) would not further the purposes of the Code and the equitable distribution of Debtor's assets among creditors, the court is convinced that the Judgment should not be allowed as a secured claim with a perfected lien against the deferred contract proceeds.

Second. It is well established that the stay is effective "regardless of whether creditors have knowledge of the stay's applicability." *Elbar Invs., Inc. v. Pierce (In re Pierce)* (*"Pierce II"*), 91 Fed. Appx. 927, 928 (5th Cir. 2004). *See also Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004) (determining that actions in violation of the automatic stay under section 362 of the Code are invalid, "whether or not a creditor acts with knowledge of the stay"); *In re Abusaad*, 309 B.R. at 898 (finding that sheriff's sale violated automatic stay regardless of whether sheriff or purchaser had knowledge of the filing of the petition); *Pierce I*, 272 B.R. at 203 ("The stay is not a judicial injunction that depends on notice. The stay is effective upon the filing of the case, regardless of notice.").

Industrial Bank does not dispute that its actions taken to obtain, perfect, and enforce the Judgment were taken while the automatic stay was in effect postpetition and during the pendency of Cases 1, 2, and 3, albeit unknown to Industrial Bank at the time its actions were taken because Industrial

Bank had not received notice of Debtor's filings. However, because the automatic stay in Debtor's Cases 1, 2, and 3 was effective upon the filing of the cases regardless of notice to Industrial Bank, the court holds that Industrial Bank's actions taken postpetition and during the pendency of Cases 1, 2, and 3 violated the automatic stay notwithstanding that Industrial Bank had no actual notice of Debtor's filings.

Third. It is firmly established in the Fifth Circuit that actions in violation of the automatic stay are not void *ab initio* and incurable but, rather, "are merely 'voidable' and are subject to discretionary 'cure.' The Fifth Circuit's position rests on the bankruptcy court's statutory power to annul the automatic stay, i.e., to 'lift the automatic stay retroactively and thereby validate actions which otherwise would be void."[4] *Chapman v. Bituminous Ins. Co.* (*In re Coho Res., Inc.*), 345 F.3d 338, 344 (5th Cir. 2003). *See also In re Abusaad*, 309 B.R. at 899 (clarifying that unless and until an action taken in violation of the automatic stay "is made valid by subsequent judicial action annulling the automatic stay," it is clear that such action is invalid and of no effect); *In re Cueva*, 371 F.3d at 236 n.2 (noting that the bankruptcy court is afforded broad discretionary authority to retroactively annul the automatic stay to validate actions taken in violation of the stay); *Thornburg v. Lynch* (*In re Thornburg*), 277 B.R. 719, 731 (Bank. E.D. Tex. 2002) ("Bankruptcy courts ordinarily must hold those who defile the automatic stay to the predictable consequences of their actions and can grant

4. Section 362(d) authorizes the bankruptcy court to "grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay. . . . " Code § 362(d).

retroactive relief only sparingly and in compelling circumstances.") (citation omitted); *Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 (5th Cir. 1995) (affirming that "actions taken in violation of the automatic stay are not *void*, but rather they are merely *voidable*, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)") (emphasis in original); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) ("The power to annul authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay.").

Industrial Bank insists that compelling circumstances exist to annul the automatic stay and retroactively validate its Judgment. *See In re Thornburg*, 277 B.R. at 731 n.18 (setting forth examples of circumstances considered compelling by courts in granting such extraordinary relief, including (1) if the creditor had actual or constructive knowledge of the bankruptcy filing; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changed its position on the basis of the action taken). Even assuming *arguendo* that Debtor's failure to give Industrial Bank notice of the Cases was unreasonable, Industrial Bank has offered nothing more than (1) conclusory allegations that it detrimentally changed its position based on lack of notice of the Cases; (2) speculative conclusions that it would have prevailed had a motion for relief been granted prior to the violation; and (3) unsubstantiated

allegations of past or anticipated unnecessary expenditures. Indeed, the equities in this case weigh in favor of the court's belief that Industrial Bank must share the same unsecured nonpriority creditor status in Case 3 as the other unsecured nonpriority claimants and that Industrial Bank should not be allowed to reap benefits resulting from its violation of the statutory automatic stay.[5] *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997) (explaining that the automatic stay "safeguards . . . creditors by preventing 'different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all . . . to capture the lion's share of the debtor's assets' "); *In re U. S. Physicians, Inc.*, 236 B.R. 593, 605-06 (Bankr. E.D. Pa. 1999) (determining that "unsecured creditors are generally entitled to relief only where they have demonstrated that the debtor had engaged in morally culpable conduct" and unsecured creditors who are denied relief "will simply share the same financial status with the other frustrated" creditors).

It appears from the record that City Bank and Debtor's other creditors hold claims that antedate Industrial Bank's violations of the stay. Had the claims of creditors arisen after Industrial Bank recorded its judgment, thus putting creditors on notice, the result here might be different. But where, as here, Debtor's three filings were intended to restructure the

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5. The test fashioned by the *In re Thornburg* court involved enforcement of a valid lien. Industrial Bank asks much more of this court. Industrial Bank asks this court to permit it to take advantage of its stay violations to bootstrap itself into a position ahead of other creditors who otherwise would be treated on a parity with Industrial Bank.

same debt, it would frustrate Congress's intent to recognize as valid Industrial Bank's secured claim.[6]

Therefore, because Industrial Bank has failed to show compelling circumstances for this court to disregard the safeguards of the automatic stay and, consistent with the court's reasoning *supra*, the court declines to (1) annul the stay; (2) retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment in violation of the stay; and (3) elevate Industrial Bank's creditor status regarding the Judgment over those creditors' claims made in compliance with the terms of the automatic stay.

CONCLUSION

Having conducted a hearing, received evidence and testimony, and reviewed the record before the court, and the court hereby **SUSTAINS** the Objection to Industrial Bank's secured claim; **DENIES** the Motion to Annul; and **DENIES** as moot the Alternative Motion. Industrial Bank's claim shall be **ALLOWED** as a general unsecured nonpriority claim.

SO ORDERED this __ day of November 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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6. The court notes that Debtor was the subject of a bankruptcy proceeding during all times pertinent to the matter at hand except for 62 days. Under Code section 108(a), *cf.* Code section 546(a)(1), pendency of a bankruptcy tolls the time for commencing suits. Thus, Industrial Bank's lien might in any case be attacked in Case 3 as a preference. *See* Code § 547(b).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 31, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-10872

In The Matter Of: LARRY BROWN

Debtor

CITY BANK; SCOTT SEIDEL

Appellants

v.

INDUSTRIAL BANK NA

Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before KING, STEWART, and DENNIS, Circuit Judges.

Appendix D

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Carolyn [illegible] King
United States Circuit Judge